

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ROBERT F. McDONNELL, :

4 Petitioner : No. 15-474

5 v. :

6 UNITED STATES. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, April 27, 2016

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:02 a.m.

14 APPEARANCES:

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16 of Petitioner.

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18 Department of Justice, Washington, D.C.; on behalf of
19 Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 15-474, McDonnell v. United States.
5 Mr. Francisco.

6 ORAL ARGUMENT OF NOEL J. FRANCISCO

7 ON BEHALF OF THE PETITIONER

8 MR. FRANCISCO: Mr. Chief Justice, and may
9 it please the Court:

10 The government argues that in quid pro quo
11 bribery, "official action" encompasses anything within
12 the range of official duties. In order to reach that
13 conclusion, it asks that you disregard a 9-0 decision of
14 this Court.

15 The government is wrong. In order to engage
16 in "official action," an official must either make a
17 government decision or urge someone else to do so. The
18 line is between access to decision-makers on the one
19 hand and trying to influence those decisions on the
20 other.

21 JUSTICE KENNEDY: And that's the Sun-Diamond
22 case, the 9-0 case that you refer to.

23 MR. FRANCISCO: Yes, Your Honor, the
24 Sun-Diamond case, the 9-0 case. And I think what
25 Sun-Diamond confirms is that when an official simply

1 refers someone to another official, an independent
2 decision-maker for an objective decision, he hasn't
3 crossed that line into prohibited "official action."

4 JUSTICE KENNEDY: I take it all parties
5 concede that the act of the university official to
6 undertake or not to undertake a research study would be
7 an "official action."

8 MR. FRANCISCO: Yes, Your Honor. And the
9 question is: Did the Governor cross the line into
10 influencing officials to undertake that action and was
11 the jury properly instructed?

12 JUSTICE KENNEDY: Can you tell me the
13 posture of the case with reference to under Virginia
14 law, the government -- the Governor's authority or lack
15 of authority to tell the university, you will engage in
16 this research or you will not engage?

17 MR. FRANCISCO: Sure, Your Honor. He --

18 JUSTICE KENNEDY: What is the state of the
19 law, and do -- do the parties agree on this point?

20 MR. FRANCISCO: Your Honor, I think that the
21 parties agree that the Governor at least had a bully
22 pulpit authority, but he had very little authority to
23 actually direct any university researcher to do
24 anything. And here I think one of the critical -- there
25 are two critical questions: One, was the jury told that

1 it even had to find that he tried to do that and here it
2 wasn't; and, two, did he in fact do that. And we would
3 assert that he clearly didn't.

4 JUSTICE GINSBURG: Would it have made a
5 difference if the medical faculties had agreed to the
6 testing?

7 MR. FRANCISCO: Your Honor, if they had
8 agreed to the testing, I still don't think it would have
9 made a difference in terms of whether Governor McDonnell
10 tried to influence their decision on that, because he
11 didn't. And it still wouldn't have made a -- a
12 difference on the jury instructions because the jury
13 still wasn't instructed that it had to find that
14 Governor McDonnell tried to influence a particular
15 governmental decision, because it wasn't so instructed.

16 JUSTICE KAGAN: Mr. Francisco, could I
17 ask -- the line you're drawing between exercising
18 influence and providing access, just to sort of test
19 that with a hypothetical, suppose that somebody knew
20 that there was a -- a contractor who was going to award
21 a very large contract to one of two or three firms that
22 the -- that he was meeting with. And -- and a company
23 paid to make sure that they were on the meet list, to be
24 one of those two or three firms, in other words,
25 bribed --

1 MR. FRANCISCO: Sure.

2 JUSTICE KAGAN: -- an official in order to
3 become one of those two or three firms from which that
4 was the pool from which --

5 MR. FRANCISCO: Right.

6 JUSTICE KAGAN: -- this billion-dollar
7 contract would emerge, would that be sufficient?

8 MR. FRANCISCO: Your Honor, I think that
9 probably would be "official action" because there the
10 only way you can even get a decision in your favor is by
11 being one of three people on that list. So being on
12 that list is a prerequisite to getting a decision.
13 Being denied -- denied on that list is a denial of the
14 decision, and that's an official governmental action.

15 Here the jury wasn't instructed on any of
16 this. They didn't have to find that Governor McDonnell
17 tried to influence anything. Indeed, it would have been
18 required to convict under these instructions if Governor
19 McDonnell had called up a staff member and said, I'd
20 like to -- you to meet with this fellow, Johnnie
21 Williams. I don't really trust him. His product is a
22 little hinky, but you're the expert. So meet with the
23 guy and exercise your complete and unfettered judgment.

24 JUSTICE KAGAN: Can I --

25 JUSTICE ALITO: Let me -- let me just change

1 the hypothetical a little bit. Suppose that a Governor
2 is going to make a -- eventually going to make a
3 decision that will help either A or B and hurt either A
4 or B, and the Governor says, you know, I'm going to have
5 a preliminary discussion about this with members of my
6 staff. We're not going to come to any decision, but
7 we're going to talk about it. And whichever of you pays
8 the most money will be able to sit in on this staff
9 meeting. What about that?

10 MR. FRANCISCO: Sure. Well, Your Honor, I
11 think I'd want to know, are there facts suggesting that
12 it really isn't just a payment to sit in on the staff
13 meeting? It's a payment to try to influence the
14 meeting?

15 JUSTICE ALITO: Just a payment to sit in.

16 MR. FRANCISCO: To sit on the -- I think it
17 would violate a whole lot of other laws, but I don't
18 think, unless there was any kind of indicia that you
19 were trying to influence the outcome, you would cross
20 that line into prohibited "official action" corruption.

21 After all, these laws are not meant to be
22 comprehensive codes of ethical conduct as this Court
23 said in Sun-Diamond. They're meant to target the worst
24 form of ethical misconduct, the corruption of official
25 decision-making.

1 JUSTICE ALITO: What if it's not just
2 sitting in? Maybe I wasn't -- I should sharpen this.
3 Supposed the party is allowed to speak and present its
4 point of view.

5 MR. FRANCISCO: Your Honor, again, the more
6 facts that you put on to suggest that it is more of an
7 attempt to influence the decision, it's not just a
8 meeting. I think the more likely you are to get to that
9 "official act" --

10 JUSTICE SOTOMAYOR: So tell me, what do we
11 do with the evidence in the case that the university
12 individuals who were assessing whether or not to do
13 these studies themselves felt pressured? There is both
14 testimony and documents in which the pros and cons of
15 accepting these studies was discussed.

16 MR. FRANCISCO: Right.

17 JUSTICE SOTOMAYOR: And in the pro and con,
18 it was, the Governor really wants us to do this.

19 MR. FRANCISCO: I --

20 JUSTICE SOTOMAYOR: The Governor is
21 pressuring us to do this. We just don't think it's a
22 good idea. They were honorable people, obviously. But
23 the point is, what do we do with the fact that they
24 perceived that he was trying to influence them?

25 MR. FRANCISCO: I have two responses, Your

1 Honor, a legal one and a factual one. Legally, you
2 still need to instruct the jury that it had to find that
3 Governor McDonnell tried to actually influence a
4 government decision. And here it wasn't instructed, so
5 they could have completely agreed --

6 JUSTICE SOTOMAYOR: But why? Isn't this --
7 I thought that this crime was taking money knowing that
8 it was being paid to influence an "official act." So
9 aren't all of these examples of "official acts" whether
10 they are or they aren't irrelevant? The question is,
11 what was his intent at the moment he took the money?
12 And why couldn't --

13 MR. FRANCISCO: Yeah.

14 JUSTICE SOTOMAYOR: -- a jury infer at that
15 moment that he took it with the intent to commit an
16 "official act" the way Mr. Williams wanted it committed?

17 MR. FRANCISCO: So again, Your Honor, two
18 responses. Even assuming that the jury could have
19 inferred it, you still need to tell them what an
20 "official act" is, that an "official act" is an attempt
21 to influence a governmental decision.

22 JUSTICE SOTOMAYOR: Well --

23 MR. FRANCISCO: Understand --

24 JUSTICE SOTOMAYOR: -- to study these
25 dietary supplements.

1 MR. FRANCISCO: Well, to -- to actually, you
2 know, conduct tobacco commission-funded State studies,
3 but you still need to tell them what that is. But I'll
4 get directly to your question. Why is it that the
5 actual "official acts" are relevant? And that's because
6 both the district court and the courts of appeals'
7 opinions made clear.

8 Here in this case, the corrupt agreement
9 turned entirely upon, as the district court case said.
10 It hinged upon whether the five specific acts were, in
11 fact, "official acts," because in the absence of any
12 direct evidence of a corrupt agreement, the government's
13 argument was that you could infer one from the pattern
14 of actual "official acts" on the one hand and the
15 pattern of gifts and loans on the other and the temporal
16 connection between the two.

17 JUSTICE KENNEDY: And so is it your position
18 at page 60 of the supplemental Joint Appendix -- the
19 instructions aren't numbered, which makes it a little
20 hard, but the judge instructs the jury that "official
21 actions" are set forth in the five paragraphs of the
22 indictment. And is it your position that at least some
23 of those are not "official acts"?

24 MR. FRANCISCO: Yes, Your Honor, and
25 certainly the five things that were proved in this case

1 are not "official acts." And likewise, I don't think
2 any of those things, as they actually came into
3 evidence, demonstrated "official acts" because in none
4 of them did Governor McDonnell cross that line in trying
5 to influence the outcome of any particular decision.
6 And just as critically, the jury was never told it had
7 to find that. So the jury in this case, Justice
8 Sotomayor, could have completely agreed with our version
9 of the facts. It could have agreed that as we argued
10 very vigorously that the most that Governor McDonnell
11 did here was refer Johnnie --

12 JUSTICE SOTOMAYOR: The matter --

13 JUSTICE KENNEDY: Well, this gets back
14 somewhat to Justice Alito's hypothetical about arranging
15 the meeting, and we -- and we can up the ante to see
16 how -- how close the meeting came to be an -- an
17 "official act." But I -- I take it that at some point
18 your position is that a governmental -- that an
19 "official act" must be the exercise of governmental
20 power. Is that your position?

21 MR. FRANCISCO: Well, Your Honor, it's
22 either making a decision on -- on an exercise of
23 governmental power, trying to influence it, as in the
24 Birdsall case, where the defendants there were trying to
25 persuade the grant of clemency.

1 But if you're simply setting up a meeting so
2 that somebody can appeal to the independent judgment of
3 an independent decisionmaker and you're not trying to
4 put your thumb on the scale of the outcome of that
5 meeting, then that simple referral can't possibly be
6 official action. After all, government officials refer
7 friends and benefactors to staff members all the time in
8 order to avoid taking official action.

9 JUSTICE GINSBURG: Do you -- do you concede
10 that there is sufficient evidence in this record --
11 let's say we accept your argument about the charge being
12 insufficient. But this could go back, and a jury could
13 be asked: Did the Governor try to influence a decision
14 on the part of the medical faculties?

15 MR. FRANCISCO: Your Honor, we don't concede
16 there was sufficient evidence. But regardless, we -- we
17 also argue that the jury was improperly instructed on
18 this, which, Justice Sotomayor, goes to the point, I
19 think, you were making. If the jury was improperly
20 instructed, then you don't actually assume all of the
21 evidence in favor of the government. The question then
22 becomes: Could a -- would a properly-instructed juror
23 have been required to convict?

24 Here, even if the jury completely agreed
25 with us, and they very well may have, under these

1 erroneous instructions they still would have been
2 required to convict, because under these instructions,
3 simply referring somebody to a meeting without trying to
4 influence the outcome of that meeting constitutes
5 official governmental action.

6 CHIEF JUSTICE ROBERTS: Well, suppose
7 arranging a meeting could be official government action,
8 if that were your job. In other words, you're not just
9 a secretary, but your job was to manage the Governor's
10 schedule. You decided who met with him, you decided
11 when, and that -- that's your job. That's -- so
12 anything that individual does, I suppose, would be an
13 official act.

14 MR. FRANCISCO: I think that's possible,
15 Chief Justice. Of course, in this case we don't have
16 anything like that. We simply have referrals to
17 meetings with other officials so that, at best, the
18 alleged bribe payor here, Jonnie Williams, can try to
19 persuade them to his cause.

20 JUSTICE KAGAN: Well, can I follow up on
21 that? Because what you just suggested, right, is that
22 you could -- suppose that there were a scheduler for a
23 Governor or for the President or whatever, and that
24 scheduler was selling meetings. So you would think
25 that's part of her job? And if I just understood you

1 correctly, that falls within the statute?

2 MR. FRANCISCO: No, Your Honor. I think
3 that would be a very close case. That -- that would be
4 a very close case, because at the end of the day, if
5 you're not actually making a governmental decision or
6 influencing the outcome of an actual governmental
7 decision, I think you -- and Chief Justice, you might
8 actually be violating a lot of other laws, including the
9 separate provision in Section 201 that prohibits you
10 from undertaking any act in violation of your official
11 duties in exchange for money, or 5 U.S.C. 7353, which
12 prohibits you from -- from taking anything from anyone
13 whose interests could be affected by the performance or
14 nonperformance of your duties.

15 But I think that the line has to be, and the
16 only line that comes out through the cases is, you're
17 actually either making a decision on because of the
18 government, or you're urging someone else to do so.
19 You're trying to pushing them in a certain direction.

20 JUSTICE BREYER: It seems to me when you say
21 "urging" -- now, wait. See, I can go back to a lot of
22 different commission, the Brown Commission, the Senate
23 S1, the language of the statute, and I read "official
24 action," something quite similar to the statute here, "A
25 decision, opinion, recommendation, judgment, vote, or

1 other conduct" -- perhaps other similar conduct --
2 "involving an exercise of discretion."

3 So in this case, the official action we're
4 talking about is giving money to a group of people in
5 the university to conduct a study.

6 Now, the Governor didn't do that. But a
7 person who tries to influence an official action and is
8 also in the government is also guilty. But wait.
9 That's the Indian case.

10 MR. FRANCISCO: Yes. You're correct.

11 JUSTICE BREYER: But wait. The word
12 "influence" is too broad, because every day of the week
13 politicians write on behalf of constituents letters to
14 different parts of the government, saying, will you
15 please look at the case of Mrs. So-and-so who was
16 evicted last week? And that's so common, you can't pick
17 that up.

18 But then you use the word "urge." That's
19 not exactly a legal word. And what I'm looking for is a
20 set of words that will describe in both sides' positions
21 what we should write as the words that describe the
22 criminal activity involved in talking to or influencing
23 the person who does create the official act, like give a
24 pardon.

25 MR. FRANCISCO: Right.

1 JUSTICE BREYER: Like award a contract, like
2 vote, like -- et cetera. Now, those are the words that
3 I can't find, and I'd appreciate your opinion.

4 MR. FRANCISCO: Sure, Your Honor. And I
5 think that the answer is that what district courts have
6 to do is understand the general rule, which I think at
7 some level has to be an attempt to influence, and then
8 flesh it out in a way that's appropriate to the facts of
9 the case.

10 JUSTICE BREYER: You want to use "attempt to
11 influence"? My goodness. Letters go by the dozens over
12 to the secretary of HUD, to the secretary --

13 MR. FRANCISCO: Right.

14 JUSTICE BREYER: -- of -- of HHS, to the
15 secretary or the assistant secretaries, and they say, my
16 Constituent Smith has a matter before you that has been
17 pending for 18 months; we would appreciate it if you
18 would review that and take action. And then the elected
19 official says to Smith, I did my best on this. And
20 Smith thinks, good, he's used his influence.

21 MR. FRANCISCO: Right.

22 JUSTICE BREYER: A crime? My goodness.

23 MR. FRANCISCO: Absolutely not, Your Honor.

24 JUSTICE BREYER: All right. Fine.

25 MR. FRANCISCO: Absolutely not.

1 JUSTICE BREYER: You say "absolutely not."

2 That's what I thought that you would say.

3 MR. FRANCISCO: And I think that --

4 JUSTICE BREYER: So I want to know -- but
5 the words you used were "attempt to influence." And so
6 -- though I don't think that's the right word, and I
7 want to know what the right words are --

8 MR. FRANCISCO: Sure.

9 JUSTICE BREYER: -- in the instruction that
10 the judge is going to give. Not in your case --

11 MR. FRANCISCO: Um-hmm.

12 JUSTICE BREYER: -- but in general.

13 MR. FRANCISCO: Well, can I give you an
14 example from another case that, although I do think
15 instructions are generally tailored to the case, an
16 example --

17 JUSTICE BREYER: Of course they are. But
18 you have to have the standard that will distinguish the
19 urger --

20 MR. FRANCISCO: Sure.

21 JUSTICE BREYER: -- from the one who does it
22 criminally and the one who doesn't.

23 MR. FRANCISCO: And in the Ring case, I
24 thought that Judge Huvelle had some very useful
25 instructions --

1 JUSTICE BREYER: Mm-hmm.

2 MR. FRANCISCO: -- where she wrote -- and
3 this is at page 1083 of the Joint Appendix --
4 "Therefore, 'official action' includes the exercise of
5 both formal official influence, such as the
6 legislature's vote on legislation, and informal official
7 influence, such as a legislature's behind-the-scenes
8 influence on other public officials in the legislative
9 or executive branches."

10 JUSTICE BREYER: Well, there we have it.
11 There we have it. All these letters going over, saying,
12 please look at Mrs. Smith's eviction notice.

13 MR. FRANCISCO: And --

14 JUSTICE BREYER: Mrs. Smith, who, by the
15 way, took me to lunch last week.

16 (Laughter.)

17 MR. FRANCISCO: And I completely agree, Your
18 Honor, which is why in our proposed instruction --

19 JUSTICE BREYER: That won't do it. The one
20 you just read won't do it.

21 MR. FRANCISCO: Well -- well, and that's why
22 in our proposed instructions, I think it needs to be
23 tailored further to the facts of the case. So in our
24 case we went on to say -- say merely arranging a
25 meeting, attending an event, hosting a reception, or

1 making a speech are not standing-alone "official acts."

2 Either you use it --

3 JUSTICE BREYER: All right. So you use

4 that. The key to the word in there is "merely."

5 MR. FRANCISCO: Yes, Your Honor.

6 JUSTICE BREYER: Because sometimes it could.

7 MR. FRANCISCO: Yes, Your Honor.

8 JUSTICE BREYER: And somebody might have the
9 embarrassing question, merely when it can or merely when
10 it can't. Give me a little enlightenment.

11 MR. FRANCISCO: Your Honor, I think that the
12 answer is, if -- if the evidence shows that there was --
13 and I hate to go back to the word that I -- I know you
14 don't like here, but if the evidence shows that there
15 really wasn't attempt -- an attempt to try to push the
16 separate decisionmaker that you're supposedly trying to
17 influence one way or another, but you really are just
18 sending it over for a meeting, and -- and that
19 independent decisionmaker is left to their independent
20 judgment, then you haven't crossed that line. But if --

21 JUSTICE KAGAN: Mr. --

22 JUSTICE GINSBURG: The word -- the word that
23 Justice Breyer is concerned about comes from Birdsall,
24 with intent to influence their "official action." So we
25 can hardly fault the district judge for using in Ring

1 the same words that this Court used in Birdsall.

2 MR. FRANCISCO: I -- I agree, Your Honor. I
3 thought that Judge Huvelle did a very good attempt at
4 defining, because she actually went further than what I
5 just read to you, Justice Breyer. She continues along
6 the lines that we proposed in our instructions that,
7 quote, "Mere favoritism as evidenced by a public
8 official's willingness to take a lobbyist's telephone
9 call or to meet with the lobbyist, is not an 'official
10 act.'"

11 So I think that the idea is, Your Honor -- I
12 understand, Justice Breyer, that influence itself
13 doesn't totally solve the problem. But what district
14 court judges do is they then explain to the jury what
15 they mean by influence, and influence is not --

16 JUSTICE KENNEDY: Where can we find the best
17 definition, in your view, of an "official act"?

18 MR. FRANCISCO: Your Honor, I think that the
19 best definition of an "official act" is -- is
20 essentially the one that I tried to articulate at the
21 outset. You need -- you need to either make a decision
22 on behalf of the government, or try in some way to use
23 your influence to pressure or urge or persuade or cajole
24 someone else who has governmental power to make a
25 decision on an action.

1 JUSTICE KENNEDY: Well, I --

2 JUSTICE KAGAN: Can I --

3 JUSTICE KENNEDY: I agree with Justice
4 Breyer. I just don't see the limiting principle in the
5 second part.

6 MR. FRANCISCO: Your Honor, I think in many
7 -- in some cases, I think the limiting principle might
8 be difficult; it's not a perfect and precise
9 formulation. But I think in this case it's a
10 particularly easy principle, because here the jury
11 wasn't given any instruction on the line at all.

12 So Justice Breyer, in your hypothetical,
13 sending that letter over is an "official act" under the
14 instructions as given and under the theory pushed by the
15 Solicitor General's office in this case because it is
16 the action --

17 JUSTICE KENNEDY: I'm -- I'm not sure -- I'm
18 not sure that's right. It seemed to me the "official
19 act" is exercise of governmental power to require
20 citizens to do or not to do something, or to shape the
21 law that can -- that governs their conduct.

22 MR. FRANCISCO: I -- I completely agree with
23 you, Justice Kennedy.

24 JUSTICE KENNEDY: Under your view, under the
25 hypotheticals that have been thrown around, the janitor

1 who gets the bottle of beer in order to clean your
2 classroom first, I mean, is that -- is that a
3 governmental act?

4 MR. FRANCISCO: Certainly not in my view,
5 but the government --

6 JUSTICE KENNEDY: Well, what's the
7 difference?

8 MR. FRANCISCO: The difference is, one --
9 one is you're exercising power on behalf of the
10 government as a whole. So the janitor, for example, if
11 he's buying -- if he's using government money to buy
12 janitorial supplies and engaging in government
13 contracting, that's an exercise of governmental power.
14 If you're simply cleaning out a classroom, I don't think
15 you're exercising government power.

16 So, too, when you simply send somebody to
17 another official for an independent and objective
18 decision by that official, but you don't try to put your
19 thumb on the scales of that decision, you haven't
20 crossed the line.

21 And I think it's very important in a
22 criminal statute like this, because if you really do
23 think that a referral, just simply making a referral, is
24 "official action" that crosses the line into bribery, I
25 think you do have some very serious vagueness concerns

1 with the Hobbs Act and on a services question --

2 JUSTICE KAGAN: Can I ask --

3 CHIEF JUSTICE ROBERTS: Sure -- sure. It
4 depends on who's making the referral or the call, right?
5 In Justice Breyer's hypothetical, if it's a
6 congressperson calling somebody and saying, could you
7 look into this matter for my constituent, the person
8 should look at it, I suppose, and then -- and that's one
9 thing. If it's the President who calls and says, I want
10 you to look at this matter for my constituent, that
11 might exercise considerably more influence.

12 MR. FRANCISCO: Two things, Your Honor.
13 First, you still do need to tell the jury that that's
14 what they have to find. And here, the jury was never
15 told in any way, shape or form that they had to find an
16 attempt to influence. So I think that is sufficient, in
17 and of itself, to, at the very least, require a new
18 trial here.

19 Under these instructions, as the government
20 itself seems to agree, any action within the range of
21 official duties constitutes official governmental
22 action.

23 So Justice Kennedy, in the letter being sent
24 over from a senator, since that is within the range of
25 official duties, that counts under the government's

1 formulation, and under the jury instruction as given,
2 since it is, after all, a settled practice of officials
3 to send these kinds of letters. That's why it was
4 incumbent upon the district court to draw some kind of
5 limit.

6 And here, the jury could well have agreed
7 with us that even though he was the governor of the
8 State, Mr. Chief Justice, he did not try to influence
9 the actual decision. He simply made the same type of
10 referral that he made day in and day out during this
11 administration where he simply sent a constituent to the
12 appropriate official --

13 JUSTICE KAGAN: Mr. Francisco --

14 MR. FRANCISCO: -- to exercise appropriate
15 judgment.

16 JUSTICE KAGAN: -- if -- you said something
17 before, and I might have misunderstood you. But do you
18 think that -- of the five listed "official acts," do you
19 think none of them meet the standards that you're
20 suggesting, or do you think some of them do and some of
21 them don't?

22 MR. FRANCISCO: Two answers. First of all,
23 we don't think that any of them meet the standard.

24 JUSTICE KAGAN: Okay. So let me --

25 MR. FRANCISCO: But secondly --

1 JUSTICE KAGAN: Go ahead, please.

2 MR. FRANCISCO: But secondly, the jury could
3 have agreed with us on that, given the evidence we put
4 further. And therefore, the erroneous instruction was
5 critical to this case, because even if they had agreed
6 with us, they would have been required to convict under
7 that erroneous instruction since -- take the healthcare
8 leaders reception. They could have concluded that that
9 was an "official act" and that was the only basis to
10 convict, and they could have agreed with our evidence on
11 everything --

12 JUSTICE KAGAN: Okay. That -- that might be
13 right. It might be that -- that you still have a -- a
14 winning argument even if some of the five are fine.
15 But -- but if we could just focus on them for a bit. I
16 mean, for example, the third one --

17 JUSTICE KENNEDY: They're -- they're at page
18 60 of the --

19 JUSTICE KAGAN: The 6091.

20 JUSTICE KENNEDY: Middle of the appendix.

21 JUSTICE KAGAN: Contacting other officials
22 to influence Virginia State researchers to initiate
23 clinical studies. So that's the one that seems to me to
24 really fall within your own definition. Do you disagree
25 with that?

1 MR. FRANCISCO: Your Honor, I don't. And if
2 they had actually proved what was said in the indictment
3 in the case, I think that this would be a -- we'd be
4 making a different argument here. But the problem is,
5 they didn't prove that Governor McDonnell tried to
6 encourage anybody. The one --

7 JUSTICE KAGAN: So on something like that,
8 your argument is a sufficiency argument?

9 MR. FRANCISCO: Yes, Your Honor.

10 JUSTICE KAGAN: Rather than this was -- this
11 is not an "official act"?

12 MR. FRANCISCO: And -- and -- yes, Your
13 Honor. To be clear, we have two separate arguments
14 here. One is on the jury instructions where our
15 argument is that even if they agreed with all of our
16 view of the facts, they still would have been required
17 to convict, given these erroneous jury instructions.

18 And secondly, our second argument is the
19 sufficiency argument. Even a properly instructed jury,
20 in our view, could not have concluded that Governor
21 McDonnell crossed that line.

22 JUSTICE KENNEDY: Well, just to be clear,
23 you -- you said at the outset you don't think any of
24 these are "official acts," but then I thought I heard
25 you say that, third, contacting other government

1 officials as part of an effort to encourage State
2 research is not an "official act"?

3 MR. FRANCISCO: That's the indictment, Your
4 Honor. If they had actually proved what was --

5 JUSTICE KENNEDY: What was -- Justice Kagan
6 is asking, is that an "official act"?

7 MR. FRANCISCO: If it actually --

8 JUSTICE KAGAN: If it's true, but --

9 MR. FRANCISCO: If he had tried to
10 encouraged them to do it, yes. If they had proved that
11 he had tried to encourage them to do that, that would
12 have been an "official act."

13 Our argument is that, first, the jury was
14 never properly instructed on that question; and second,
15 he never did in fact urge university researchers to do
16 anything.

17 And if I could just conclude, before
18 reserving the remainder of my time for rebuttal, at the
19 one event where he actually had direct contact with the
20 university researchers, Justice Kagan, this was the
21 luncheon held at the mansion. The -- all of the
22 witnesses who were there actually testified as to two
23 things with respect to the Governor.

24 First, he simply asked neutral questions
25 that didn't try to push the researchers' decisions one

1 way or another. And secondly, the one time Jonnie
2 Williams asked him for something, support before Tobacco
3 Commission funding, he gave Jonnie Williams a very
4 polite no.

5 Mr. Chief Justice, if I could reserve my
6 time.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Dreeben.

9 ORAL ARGUMENT OF MICHAEL R. DREEBEN

10 ON BEHALF OF RESPONDENT

11 MR. DREEBEN: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 Petitioner seeks a categorical carve-out
14 from the concept of an "official act" for things like
15 meetings, phone calls, events, that, in his view, do not
16 further or advance or attempt to influence a particular
17 government action, but simply provide somebody with
18 access to the government.

19 CHIEF JUSTICE ROBERTS: Well, he's not --
20 he's not the only one. One -- there's an extraordinary
21 document in this case, and that's the amicus brief filed
22 by former White House counsel to President Obama, former
23 White House counsel to President George W. Bush, former
24 White House counsel to President Clinton, former White
25 House counsel to George H.W. Bush, former White House

1 counsel to President Reagan. And they say, quoting
2 their brief, that "if this decision is upheld, it will
3 cripple the ability of elected officials to fulfill
4 their role in our representative democracy."

5 Now, I think it's extraordinary that those
6 people agree on anything.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: But -- but to agree
9 on something as sensitive as this and to be willing to
10 put their names on something that says this -- this
11 cannot be prosecuted conduct. I think is extraordinary.

12 MR. DREEBEN: It may be extraordinary, Mr.
13 Chief Justice, but that doesn't make it correct. I
14 think it rests on several fundamental misconceptions
15 about what government actually does. And I think it's
16 important to pause and look at the implications of what
17 Petitioner's pay-to-play theory of government really is;
18 that people can pay for access, that they can be charged
19 to have a meeting or have a direction made to another
20 government official to take the meeting.

21 It would mean, in effect, that if somebody
22 came to me and said, you know, I know you're having a
23 lot of college tuition issues. We can help you with
24 that. The criminal division is not giving us a meeting
25 on whether to appeal a case. Just call them and see if

1 you can get them to take the meeting. And I don't
2 know --

3 CHIEF JUSTICE ROBERTS: You're --

4 JUSTICE KENNEDY: I don't know --

5 CHIEF JUSTICE ROBERTS: It's -- it's
6 somebody in the government whose client comes to them
7 and says, we'd really like the Solicitor General's
8 Office to file a brief in our case. And then that
9 person calls you up and says, can you meet with
10 so-and-so? All he wants to do is sit down with you and
11 persuade you why you should file a brief supporting his
12 case.

13 MR. DREEBEN: But getting in the door, Mr.
14 Chief Justice, is one of the absolutely critical things.

15 CHIEF JUSTICE ROBERTS: So is your answer,
16 yes, that that's a felony?

17 MR. DREEBEN: If somebody pays me --

18 CHIEF JUSTICE ROBERTS: No, no. That's the
19 quid -- that's the quid side of it.

20 MR. DREEBEN: Yes.

21 CHIEF JUSTICE ROBERTS: I'm talking about
22 the pro side in the quid pro quo.

23 MR. DREEBEN: Taking a meeting, yes, I think
24 taking a meeting is absolutely government action.

25 JUSTICE KENNEDY: So if -- so if the

1 President gives special access to high-dollar donors to
2 have meetings with government officials, that is a
3 felony?

4 MR. DREEBEN: Certainly not, Justice
5 Kennedy. And I --

6 JUSTICE KENNEDY: Why certainly not?

7 MR. DREEBEN: Because the critical issue
8 there is whether the government can prove a quid pro
9 quo. And now we're moving into the realm of campaign
10 contributions, where this Court has given very strict
11 guidance about when a jury --

12 JUSTICE BREYER: It's not a campaign
13 contribution. What it is, is he takes him to lunch, and
14 an expensive lunch at that. Okay? Because the quid
15 side is not limited. The government has argued
16 continuously that in for a penny, in for a pound. Okay?
17 So we don't have the limitation on the quid side. We
18 have a possible limitation in frame of mind.

19 And now we're looking to the quo side. And
20 you want to remove any limitation there. Okay?

21 Now, why do I think that's a problem? Two
22 very fundamental reasons. And it's not because I'm in
23 favor of dishonest behavior. I'm against it. And we
24 have just listed some that is dishonest. My problem is
25 the criminal law as the weapon to cure it. And if the

1 criminal law is the weapon that goes as far as you want,
2 there are two serious problems. One, political figures
3 will not know what they're supposed to do and what
4 they're not supposed to do, and that's a general
5 vagueness problem.

6 And the second is, I'd call it a separation
7 of powers problem. The Department of Justice in the
8 Executive Branch becomes the ultimate arbiter of how
9 public officials are behaving in the United States,
10 State, local, and national. And as you describe it, for
11 better or for worse, it puts at risk behavior that is
12 common, particularly when the quid is a lunch or a
13 baseball ticket, throughout this country.

14 Now, suddenly, to give that kind of power to
15 a criminal prosecutor, who is virtually uncontrollable,
16 is dangerous in the separation of powers since. So in
17 my mind -- right in this case, nothing to do with this
18 Petitioner, nothing to do with him, but in this case, is
19 a -- as fundamental a real separation of -- of powers
20 problem as I've seen.

21 And -- and I'm not quite certain what the
22 words are. They won't be perfect. They will leave some
23 dishonest conduct unprosecuted. They won't be perfect.
24 They will put some politicians at risk. But I'm
25 searching for those words because, as I said, this is a

1 very basic separation of powers problem for me.

2 MR. DREEBEN: So --

3 JUSTICE BREYER: I appreciate your help on
4 what the right words are, and I'll tell you right now if
5 those words are going to say when a person has lunch and
6 then writes over to the antitrust division and says, I'd
7 like you to meet with my constituent who has just been
8 evicted from her house, you know, if that's going to
9 criminalize that behavior, I'm not buying into that, I
10 don't think.

11 So -- so I want some words that will help
12 with what I see as as knotty and complicated and
13 difficult and basic a problem as I can think of.

14 MR. DREEBEN: Justice Breyer, let me first
15 argue the position that I came here to argue, which is
16 that "official action" is not limited by some arbitrary
17 litmus test that was proposed by Petitioner that would
18 exclude things that he calls "access." I don't think
19 that that's the right way to look at it. I think that
20 the right way to look at this statute is to recognize
21 that it has multiple elements. We're talking about
22 multiple statutes. But the bribery offense has very
23 similar elements.

24 You first have to decide whether someone is
25 engaging in an "official act." Merely going to lunch is

1 not engaging in an "official act." There are
2 opportunities to engage --

3 JUSTICE BREYER: No, no one said it is. The
4 lunch with the Chateau Lafite wine happens to be the
5 quid, and -- and that's worth, like, a thousand dollars,
6 or 500, anyway. I don't go to those restaurants
7 anymore.

8 (Laughter.)

9 MR. DREEBEN: Justice Breyer --

10 JUSTICE BREYER: But -- but you understand
11 that --

12 MR. DREEBEN: -- I -- I don't -- I don't
13 go --

14 JUSTICE BREYER: -- side. It's the other
15 side of the equation.

16 MR. DREEBEN: I understand, Justice Breyer.
17 But what -- I would think it would be helpful for the
18 Court if I could lay out the multiple elements that are
19 at issue here because "official act" does not have to do
20 all the work. You do have to have somebody engaged in
21 their official capacity. You then have to have
22 something that they do within their range of official
23 duties, which going to lunch is not going to be.

24 Third, you need a quid pro quo, which means
25 that the government is going to have to show that the

1 person allowed themselves to be influenced in their
2 conduct by the thing of value that they received, which
3 is to say that somebody is basically saying, I'm going
4 to make a referral over to another agency for you only
5 if you buy me lunch. That is not honorable behavior,
6 and there are --

7 JUSTICE BREYER: Of course it isn't.

8 MR. DREEBEN: -- many regulations that carve
9 out permissible gift situations and create the fourth
10 element issue that I think is an important protection,
11 which is mens rea.

12 JUSTICE KENNEDY: But the problem is, and as
13 you set forth in your brief correctly, you can imply an
14 agreement over time. You can imply a contract over
15 time. And if the lunch takes place first and there's --
16 there's no precondition on the lunch, but after the
17 lunch there is wink-wink, nod-nod, and the contact takes
18 place, it's clear in the standard criminal law that
19 there is a conspiracy there.

20 MR. DREEBEN: So I agree with you --

21 JUSTICE KENNEDY: We're in agreement.

22 MR. DREEBEN: I do agree with you, Justice
23 Kennedy. I think that's exactly the position that Your
24 Honor's opinion in Evans, the separate concurrence,
25 explained as a proper means of administering the quid

1 pro quo requirement as an intent to issue in a criminal
2 case. There is a very critical protection here. It's a
3 requirement of showing something beyond a reasonable
4 doubt to a jury. And if you have ordinary conduct
5 that's fully disclosed and in accordance with
6 regulations which do strictly limit when people can
7 receive lunches --

8 JUSTICE ALITO: I don't see what the
9 relevance of those regulations is. You say -- you say
10 there were certain safe harbors created by Federal
11 regulations. Those apply to Federal employees and
12 Federal officers. What do they have to do with a
13 Governor of a State or a State employee?

14 MR. DREEBEN: Well, they don't, Justice
15 Alito. This case has been litigated on the submission
16 that Section 201 informed the meeting of "official
17 action" for purposes of the Hobbs Act and the honest
18 services statute. And as a result, the parties have
19 engaged very heavily on the effect on Federal officials.
20 And I think that Justice Breyer's question was primarily
21 directed at them.

22 I do think that there are different issues
23 that arise with respect to State officials, but the mens
24 rea requirements that I've been talking about are going
25 to be fully applicable --

1 JUSTICE BREYER: Yeah, but how -- but you're
2 asking --

3 JUSTICE KENNEDY: But then this -- this
4 doesn't answer Justice Breyer's basic question and ours.
5 You're going to tell the Senators, the officials with
6 the lunches, that, don't worry. The jury has to be
7 convinced beyond a reasonable doubt, and that's tough.

8 (Laughter.)

9 MR. DREEBEN: Well --

10 JUSTICE KENNEDY: That was your answer.
11 That was your answer.

12 MR. DREEBEN: Justice Kennedy, I do think
13 that the requirements of the criminal law in proving
14 something by beyond a reasonable doubt are a substantial
15 --

16 JUSTICE BREYER: What is it they're trying
17 to prove? Now, of course, this is a State case, not a
18 Federal case. It's a State official -- it's a Federal
19 law but a State official. I don't know. I've only been
20 peripherally involved in political campaigns, but my
21 peripheral convinces me that a candidate will go out and
22 he'll have lunch with hundreds of people, hundreds.
23 Everybody wants to give him lunch. Great. And -- and
24 he wants to meet as many people as possible. He wants
25 to be friendly. He might receive a raincoat. He might

1 receive all kinds of things. And at some point, it
2 becomes very dishonest.

3 MR. DREEBEN: So --

4 JUSTICE BREYER: But that's a matter for
5 campaign laws.

6 Wait. Now, I've also been involved in the
7 Justice Department. And we would receive many, many
8 letters in the antitrust division. Have you looked into
9 such and such? I know perfectly well that that Senator
10 just wants to go back to the constituent and say, see, I
11 did my best. That's all.

12 Now, you're saying to the jury, take those
13 facts I just gave you, and you look into the state of
14 mind -- the state of mind of which the amounts being
15 given will be somewhat indicative, of which the nature
16 of the letter will be somewhat indicative, of whether he
17 writes in personal writing at the bottom will be
18 somewhat indicative, and we're going to let you 12
19 people work out what was really in that Senator's mind.
20 I say that is a recipe for giving the Department of
21 Justice and the prosecutors enormous power over elected
22 officials who are not necessarily behaving honestly.

23 And I am looking for the line. I am looking
24 for the line that will control the shift of power that I
25 fear without allowing too much honesty through this law.

1 You know, other laws exist on the other side.

2 MR. DREEBEN: Well, Justice --

3 JUSTICE BREYER: That -- that's what I want
4 your view on.

5 MR. DREEBEN: Justice Breyer, I'm going to
6 push back, because I think that the line that Petitioner
7 has urged is one that is a recipe for corruption, not a
8 recipe for drawing a safe harbor for public officials.

9 What he has basically urged the Court to
10 hold is that paying for access, if somebody does not put
11 a thumb on the scale of decision -- if I, for example,
12 tell the criminal division, take the meeting, make
13 whatever recommendation is in your best judgment, just
14 take the meeting, I can take money for that. And I
15 think the message that would be sent, if this Court put
16 its imprimatur on a scheme of government in which public
17 officials were not committing bribery when all they did
18 was arrange meetings with other governmental officials,
19 without putting, in his metaphorical way, a thumb on the
20 scales of the ultimate decision, would send a terrible
21 message to citizens. What --

22 JUSTICE ALITO: Well, what I think we're
23 looking for is some limiting principle. Now, you -- you
24 started to say something about campaign contributions --

25 MR. DREEBEN: Correct.

1 JUSTICE ALITO: -- and I know that this case
2 doesn't involve campaign contributions. But certainly a
3 campaign contribution can be the quid, can it not?

4 MR. DREEBEN: Certainly.

5 JUSTICE ALITO: All right. Well, gaining
6 access by making campaign contributions is an everyday
7 occurrence. And maybe it's a bad thing, but it's very
8 widespread. How does it -- how does that play out?

9 MR. DREEBEN: So, Justice Alito, gaining
10 access and ingratiation and gratitude as a result of
11 campaign contributions is not a crime. When it's done
12 as a quid pro quo, it is. And that is not the --

13 JUSTICE BREYER: That's --

14 MR. DREEBEN: That is not the --

15 JUSTICE BREYER: That's what I want, your
16 view.

17 MR. DREEBEN: That is not my view, Justice
18 Breyer.

19 JUSTICE BREYER: But, I mean --

20 JUSTICE ALITO: Mr. Dreeben, if I could just
21 follow up on that.

22 If a -- a Senator writes to a Federal agency
23 and says, this union or this company is, you know,
24 critical to the economy of my State, and, by the way --
25 he doesn't say this, but, by the way, they are the

1 biggest contributors to his campaign -- would you please
2 meet with them? What would not make that a crime? The
3 fact that the jury might not find beyond a reasonable
4 doubt that the reason why he was urging this meeting was
5 because these people, this entity, happened to be a very
6 big supporter? That would be the only thing separating
7 lawful from unlawful conduct there?

8 MR. DREEBEN: Well, let -- let me say two
9 things in response to that. First, this Court has
10 addressed that very issue in the McCormick case. And it
11 is established that merely taking favorable action at or
12 around the time of the receipt of campaign contributions
13 is not sufficient to show a quid pro quo and is not a
14 crime.

15 Nobody doubts that if there's a quid pro quo
16 for a vote, something that I think Mr. Francisco is
17 prepared to concede is "official action," although I'm
18 not sure why since it doesn't personally exercise
19 sovereign power if a legislator casts vote as a
20 dissenting vote from a majority action. But nobody
21 disputes that that is a crime. Therefore, this Court
22 has already carved out evidentiary and instructional
23 safeguards that prevent against a jury inferring a quid
24 pro quo merely from the coincidence of timing.

25 But I want to come back to something that is

1 even more fundamental, and that is the role of the First
2 Amendment in this case. Because Petitioner has sought
3 to wrap himself in the mantle of the First Amendment,
4 probably because the gifts that he received have nothing
5 to do with the First Amendment; they have to do with
6 personal loans and luxury goods.

7 This is not a case about campaign
8 contributions. But when campaign contributions are at
9 issue, he relies very heavily on Citizens United while
10 ignoring a critical piece of Citizens United.

11 This Court, in Citizens United, looked back
12 to the circumstances that prompted the Federal Election
13 Campaign Act in 1972, and those involve circumstances
14 that were delineated in the Buckley decision in the
15 court of appeals.

16 And the Court specifically cited to those
17 practices. And what were those practices? They
18 involved the American milk producers paying \$2 million
19 in campaign contributions, spread out among a variety of
20 committees, to get a meeting at the White House. That's
21 all they did. They said, in order to gain a meeting
22 with White House officials on price supports, they paid
23 that money.

24 Other corporate executives testified that
25 paying money was a calling card, something that would

1 get us in the door and make our point of view heard.
2 And this Court said, on page 356 of the Citizens United
3 opinion, "The practices Buckley noted would be covered
4 by the bribery laws, CEG 18 U.S.C. 201, if a quid pro
5 quo arrangement were proved."

6 Now, of course, it's very difficult to prove
7 a quid pro quo arrangement, and that's why there are
8 campaign finance limitations on contributions to
9 candidates. But the Court had no doubt that paying for
10 access was a criminal violation. And so --

11 CHIEF JUSTICE ROBERTS: So --

12 MR. DREEBEN: And that's what --

13 CHIEF JUSTICE ROBERTS: -- if you have a
14 governor whose priority is jobs for his State, and
15 there's a CEO who's thinking about locating a plant in
16 his State, but he can only do it, he says, if he gets
17 tax credits from the State.

18 So the governor is talking to him, and he
19 says, look, why don't you come down to my, you know,
20 trout stream and we'll go fishing and we'll talk about
21 this. And the governor does that. He has a nice day
22 fishing for trout, and they talk about whether they can
23 get tax credits, deferred taxes if the CEO opens his
24 plant in the State. Now, is that a felony, because
25 he's --

1 MR. DREEBEN: I --

2 CHIEF JUSTICE ROBERTS: -- accepted an
3 afternoon of trout fishing, and he discussed official
4 business at that time?

5 MR. DREEBEN: I don't think so, Mr. Chief
6 Justice, but if you change the hypothetical and said
7 instead of an afternoon of trout fitting -- fishing,
8 I'll fly you out to Hawaii and you and your family can
9 have a vacation, and during that time we can go over my
10 policy --

11 CHIEF JUSTICE ROBERTS: But I thought -- I
12 didn't think the government put any weight on the amount
13 of the quid; in other words, you know -- okay. I don't
14 know how much an afternoon of trout fishing is worth,
15 but I -- I gather you get -- you can be charged for that
16 and -- and pay for it.

17 I thought that didn't matter. I thought it
18 was whether he was engaged in an "official act" under
19 circumstances in which a jury could find he did it
20 because of the gift.

21 MR. DREEBEN: Yes.

22 CHIEF JUSTICE ROBERTS: And -- and so if all
23 he's doing is talking about ways to get jobs for
24 Virginia, and he's talking with the person who's going
25 to make that decision from the private sector, based in

1 part on whether or not he gets, you know, tax credits,
2 it would seem to me that under your definition, that
3 governor is guilty of a felony.

4 MR. DREEBEN: I'm not sure that he is guilty
5 of a felony. But the reason why I changed the
6 hypothetical to involve a larger quid is because the
7 implications of carving something out from "official
8 action" mean that it can be sold, and that it's lawful
9 to be sold. And when you change the trout fishing to a
10 trip to Hawaii, it becomes more nefarious, and the
11 message that it sends to citizens is --

12 JUSTICE BREYER: But that's the point. You
13 see, what -- exactly what the Chief Justice asked.
14 What's the lower limit, in the government's opinion, on
15 the quid? What? Tell me right now. What -- if you're
16 going to say \$10,000, okay, I feel quite differently
17 about this. If you will say an afternoon of trout
18 fishing or et cetera, then I feel quite differently.
19 It's pretty hard to see the conduct being honest if you
20 exempt the campaign contributions and put it up
21 somewhere. But I didn't think that was the government's
22 position.

23 MR. DREEBEN: It's not the government's --

24 JUSTICE BREYER: What is the government's
25 position -- what -- you tell me I'm wrong, in for a

1 penny, in for a pound. You tell me right now it is not
2 the government's position that the trout fishing
3 afternoon is sufficient to be a -- a quid. If you say
4 that, I'll feel differently about the case.

5 (Laughter.)

6 MR. DREEBEN: It's tempting, Justice Breyer,
7 but I'm not going to --

8 JUSTICE BREYER: Exactly.

9 MR. DREEBEN: -- exempt from the corruption
10 laws --

11 JUSTICE BREYER: Okay.

12 MR. DREEBEN: -- certain types of quids.

13 But --

14 JUSTICE BREYER: But now --

15 MR. DREEBEN: -- Justice Breyer, you do need
16 to run this through all the elements of the offense. I
17 think what Petitioner is -- is saying, and I think some
18 of the Court's hypotheticals are suggesting the only
19 thing that really you could possibly do to remedy this
20 issue is to shrink the definition of "official action"
21 with no textual basis in 201, nor really, I think, any
22 common sense basis in the way that government actually
23 operates --

24 JUSTICE BREYER: You tell me -- that's why I
25 asked you at the beginning. And you -- in order to

1 be -- you say you're going to push back, and then you
2 complained about their definition. If I thought their
3 definition was so perfect, I wouldn't have asked you.
4 And -- and it's -- it's exactly -- you do -- you tell me
5 how to do this. And I'm not -- you say it sends a
6 terrible message. I'm not in the business of sending
7 messages in a case like this. I'm in the business of
8 trying to figure out the structure of the government.
9 And that's part of Separation of Powers, and I expressed
10 my concern.

11 MR. DREEBEN: So I think --

12 JUSTICE BREYER: I dissented in -- in
13 Citizens United, so whatever that said there, but --

14 (Laughter.)

15 JUSTICE BREYER: The -- the -- but the point
16 is the one I raised at the beginning that every single
17 one of us has raised. We're worried about -- because
18 like any other organization, the prosecutors too can be
19 overly zealous. That can happen. And so we need some
20 protection on both sides, even though the line won't be
21 perfect. And it will fail to catch some crooks. And it
22 will -- I mean, I understand that. And -- and I want to
23 know your view. And it doesn't even -- it helps a
24 little, but not a lot, to say, well, meetings.

25 MR. DREEBEN: So --

1 JUSTICE BREYER: That's too specific. I
2 want to know what your view is as to the language we
3 write in discussing the line.

4 MR. DREEBEN: Well, I don't think you and I
5 agree on where the line should be, Justice Breyer. So
6 I -- I can't write language that is going to satisfy
7 you. You weren't even satisfied with Petitioner's
8 language, which requires that there be influence on some
9 other governmental decision. You suggested you thought
10 that was too broad.

11 JUSTICE BREYER: No, no, no. Well, yeah,
12 yeah, yeah, yeah.

13 MR. DREEBEN: You did suggest it.

14 JUSTICE BREYER: I did --

15 (Laughter.)

16 MR. DREEBEN: I think that it's too narrow.
17 I think that if the Court is going to reject the
18 government's submission, which is that when the governor
19 calls his Secretary of Health and says, take the meeting
20 with my benefactor, he doesn't disclose it's his
21 benefactor. Take the meeting so that that person can
22 have the preferential opportunity that other citizens
23 who do not pay will have to make his case before you. I
24 think that is "official action."

25 Petitioner says it's not "official action"

1 unless he further sends the message, which I think on
2 the facts of this case was sent, he's trying to
3 influence the ultimate outcome.

4 If the Court is going to reject the
5 government's position in this case, then I think that a
6 fallback position for the government is when you have an
7 indisputed "official action," such as will the
8 universities of Virginia study a particular product, or
9 will the Tobacco Commission fund it, then when a public
10 official takes action to direct that decision, to
11 influence that decision, or to advance his benefactor's
12 interests with respect to that decision, that
13 constitutes the crime of bribery.

14 CHIEF JUSTICE ROBERTS: There -- there is --

15 MR. DREEBEN: Now --

16 CHIEF JUSTICE ROBERTS: Given the difficulty
17 that we're having in settling on what these words in the
18 statute mean, there is a -- an argument in the
19 Petitioner's brief that you have responded to in yours
20 that the statute is unconstitutionally vague.

21 MR. DREEBEN: I -- I do not think it is
22 unconstitutionally vague. First of all, we're talking
23 here about multiple statutes. We're talking about Hobbs
24 Act extortion, which this Court previously construed in
25 both McCormick and Evans to be perfectly valid upon the

1 proof of a quid pro quo when the official asserts that
2 his action will be controlled by a -- a thing of value
3 that he has received.

4 And now we're talking about the question of
5 what constitutes "official action" for the purposes of a
6 common law crime that goes back centuries and was
7 incorporated into the Hobbs Act.

8 We're also talking about the honest-services
9 statute, which this Court in Skilling just six years ago
10 determined could be construed --

11 CHIEF JUSTICE ROBERTS: Well, yeah. "Could
12 be construed." I mean, there were, what, three votes to
13 find it unconstitutional? And the others say, well, no,
14 because you can narrow it in this way to the core
15 definition of bribery. And now maybe the -- the
16 experience we've had here, and the difficulty of coming
17 up with clear enough instructions suggests that the
18 caution the Court showed at that point was ill-advised.

19 MR. DREEBEN: Well, I think it would be
20 absolutely stunning if this Court said that bribery and
21 corruption laws, which have been on the books since the
22 beginning of this nation, and have been consistently
23 enacted by Congress to combat both Federal, State, and
24 local corruption --

25 JUSTICE KENNEDY: Would it be --

1 CHIEF JUSTICE ROBERTS: And --

2 JUSTICE KENNEDY: -- absolutely stunning to
3 say that the government has given us no workable
4 standard?

5 MR. DREEBEN: Well, we have given you a
6 workable standard. It's the standard that comes from
7 this Court's 1914 decision in Birdsall, where the Court
8 said that things that government officials do under a
9 bribery statute much like this are covered as official
10 action, and they're not limited to things that --

11 JUSTICE KENNEDY: Perhaps what you're
12 talking about is how evil the conspiracy is. It's not
13 evil to -- to fish or to have a bottle of wine, but it
14 is evil if you up the ante. Is that -- is that what
15 you're saying?

16 MR. DREEBEN: I think what I'm trying to
17 say, Justice Kennedy, is that it's going to be extremely
18 difficult for anyone to really believe that you could
19 buy a Governor's position on a multimillion-dollar tax
20 support for an afternoon of trout fishing. And that's
21 why those cases don't get brought. No one thinks about
22 them. It's not really even clear there is a quid pro
23 quo for --

24 JUSTICE KAGAN: Can I ask you a narrower
25 question, Mr. Dreeben?

1 So one of the "official acts" here -- I'll
2 just read it to you. It's allowing Jonnie Williams to
3 invite individuals important to Star Scientific's
4 business to exclusive events at the Governor's Mansion.

5 MR. DREEBEN: Yes.

6 JUSTICE KAGAN: So that's essentially
7 hosting a party and allowing Mr. Williams to invite some
8 people. And why does that -- why is that an "official
9 act," in your view?

10 MR. DREEBEN: So, Justice Kagan, it wasn't
11 hosting an official party. We're talking about here two
12 events. One was a product launch hosted at the
13 Governor's Mansion where the Governor is basically
14 giving his credibility to a brand-new product. And the
15 invitations were critical to Jonnie Williams' plan to
16 sign up the universities to do the studies. He got to
17 pick --

18 JUSTICE KAGAN: So here's, I guess -- I
19 mean, I guess, my question is this: The -- the
20 "official act," the statute, the definition, I mean,
21 requires that there be some particular matter, cause,
22 suit, proceeding, or controversy, correct?

23 MR. DREEBEN: Yes.

24 JUSTICE KAGAN: And if I understand the
25 theory of this case, the matter, suit, cause,

1 proceeding, or controversy here is the attempt to get
2 the University of Virginia to do clinical studies of
3 this product; is that correct?

4 MR. DREEBEN: It's narrower than our whole
5 scope of the charge, but it's essentially correct.

6 JUSTICE KAGAN: That's the gravamen of the
7 thing?

8 MR. DREEBEN: Correct.

9 JUSTICE KAGAN: So if you had just -- if --
10 if the indictment, and then the instructions that were
11 based on the indictment, had said the "official act" is
12 getting the University of Virginia to do clinical
13 studies, right, that reads very differently from the way
14 this indictment was structured. Because what this
15 indictment does is it takes a lot of different pieces of
16 evidence that might relate to that "official act" and
17 charges them as "official acts" themselves, so that the
18 party becomes an "official act" or calling somebody just
19 to talk about the product becomes an "official act." Do
20 you see what I mean?

21 I mean, you know, this might have been
22 perfectly chargeable and instructable, but I guess
23 I'm -- I'm troubled by these particular charges and
24 instructions, which seems to make every piece of
25 evidence that you had an "official act," rather than

1 just saying the "official act" was the -- was the
2 attempt to get the University of Virginia to do
3 something that they wouldn't have done otherwise.

4 MR. DREEBEN: So, Justice Kagan, what the
5 crime was here was the Governor accepting things of
6 value in return for being influenced and taking
7 "official actions" to legitimize, promote, and secure
8 research studies for Anatabloc and Star's products.
9 That's at Supplemental JA 14.

10 It then alleges that he would do this as
11 opportunities arose in the course of his official
12 actions. And because he's the Governor and he has a
13 tremendous amount of influence throughout the
14 government, he appoints all the board of visitors of VCU
15 and UVA. He sets the budget. They know that he's an
16 important guy. He has lots of opportunities to do this
17 in different ways over time.

18 And if you look at the pattern of what he
19 did, directing people to meet with Star's
20 representatives, arranging events at the mansion in
21 which Star could bring together its chosen guest list,
22 the doctors who it wanted to influence with the Star
23 people who were trying to influence it, the Governor is
24 taking every step he can do short of saying to UVA, do
25 the studies, which his chief counsel told him would be

1 inappropriate and wasn't going to do.

2 So I -- I think that if you look at the
3 indictment the way that it's actually structured, it
4 talks about a person who, as opportunities arose, was
5 going to engage in "official acts." This is a theory of
6 corruption that Justice Sotomayor's opinion in Ganim in
7 the Second Circuit validated, and it was cited in
8 Skilling as a perfectly valid theory of corruption.

9 And, therefore, the individual "official
10 acts" really form a composite window into Petitioner's
11 mind. Did he intend to allow his official conduct to be
12 controlled by the things of value that he received? And
13 taking them all together, even if the Court has trouble
14 with any individual one, they allowed a rational jury to
15 inference that, indeed, he did.

16 And the only way that Petitioner could win,
17 if you agree with me on the sufficiency issue, is if you
18 conclude that jury instructions must exempt certain
19 types of official actions, like directing your Secretary
20 of Health to take a meeting, which is a very kind of
21 significant event in the life of a cabinet member and a
22 governor, or hosting an event at the mansion, can't
23 possibly count, because it somehow should be viewed as
24 social, when, in fact, what the Governor is doing is
25 allowing his benefactor to get all the people in the

1 room who he wants to influence to do the studies.

2 So in my view, there was nothing wrong -- if
3 I can complete the sentence -- in the way that the
4 indictment structured the crime in this case. The
5 "official acts" were exemplary. They were proved, and
6 the jury could properly find them.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Francisco, five minutes remaining.

10 REBUTTAL ARGUMENT OF NOEL J. FRANCISCO

11 ON BEHALF OF PETITIONER

12 MR. FRANCISCO: Thank you, Mr. Chief
13 Justice.

14 I have three basic points I would like to
15 make.

16 First, I'd like to start out with the
17 government's argument that a lot of the problems with
18 its theory are solved by the quid pro quo requirement.
19 Well, in fact, the gratuity statute, the Federal
20 gratuity statute, has the exact same "official act"
21 requirement, but no quid pro quo requirement at all.

22 So what that means is that if you take
23 somebody to a fancy lunch with a -- I can't remember the
24 name of the bottle of wine you mentioned, Justice
25 Breyer, but if you took them to that fancy lunch to

1 thank them for referring you to a meeting with a
2 mid-level staffer, even if there was no suggestion at
3 all that you were going to do anything other than call
4 that staffer and say, hey, can you take a meeting with
5 this guy, hear him out, and exercise your independent
6 judgment, that would be a violation of the Federal
7 gratuity statute.

8 And, indeed, under the government's broad
9 theory that anything within the range of official duties
10 counts, that means that if you took the person out to
11 that lunch as thanks for giving you a tour of the
12 Capitol Building, you would likewise have violated the
13 Federal gratuity statute, because there, there is no
14 quid pro quo requirement at all.

15 Point two, Justice Breyer --

16 JUSTICE SOTOMAYOR: There is a difference
17 between someone saying, thank you for a decision you
18 made independent of the gift -- that's the Sun Growers
19 case -- and someone buying you an expensive lunch and
20 saying, I'm paying for this lunch, but make sure I get a
21 tour. You don't see the difference?

22 MR. FRANCISCO: Not under the Federal
23 gratuity statute, Your Honor, because the Federal
24 gratuity statute is meant to prohibit thanking somebody
25 for giving you an "official act." And so if an

1 "official act" is, in fact, a tour of the Capitol
2 Building or a meeting with a staffer, then you have, in
3 fact, violated the Federal gratuity statute when you
4 take them to lunch as a thanks for that particular act.

5 Second point, Justice Breyer, in trying to
6 figure out the right verbal formulation, the first point
7 I'd like to make is, if we can't figure out a proper
8 verbal formulation, then I think there are some ver
9 serious vagueness problems with the statute --

10 JUSTICE BREYER: It's Birdsall.

11 JUSTICE SOTOMAYOR: You --

12 JUSTICE BREYER: It's Birdsall. Look, I
13 can -- I've read the Brown Commission Report. I've read
14 the Model Penal Code. I've read all these efforts to
15 get language. And I've looked at the present statute.
16 And I think I can limit that because the statute,
17 itself, seems to cover things like voting and contracts,
18 et cetera. But it's also true that a person who tries
19 to influence those things has committed bribery. I
20 think that's correct.

21 MR. FRANCISCO: And --

22 JUSTICE BREYER: Now, my problem is with
23 Birdsall and how do we write those words so that they do
24 catch people who are doing this dishonest thing without,
25 as I've said five times, allowing the government the

1 freedom to go and do these ridiculous cases.

2 MR. FRANCISCO: And -- and I think the D.C.
3 Circuit's en banc decision --

4 JUSTICE BREYER: Not saying this is a
5 ridiculous one, by the way.

6 MR. FRANCISCO: Understood, Your Honor. I
7 think that the right answer, you start out with the D.C.
8 Circuit's decision in Valdes. You look at that listing
9 of words --

10 JUSTICE BREYER: Uh-huh.

11 MR. FRANCISCO: -- question, matter, suit,
12 cause proceeding. And those are actual decisions that
13 the government makes, the government as a whole, as a
14 sovereign. And then you say, are you making a decision
15 on that, if you're the final decisionmaker, or if you're
16 not the final decisionmaker, but because of your
17 official power, you have the -- the ability and the
18 authority to influence other decision-makers, then
19 you're -- are you doing that? Here are two
20 fundamental --

21 JUSTICE GINSBURG: What do you say to
22 Mr. Dreeben's argument that if we read this statute as
23 you are urging, then every government official can say,
24 you want to have a meeting? Pay me a thousand dollars.
25 The corruption that's inherent in the position that says

1 it's okay to facilitate a meeting, it's okay to say,
2 I'll do it for you if you pay me a thousand dollars.
3 That's your view, that that would be okay?

4 MR. FRANCISCO: Your Honor, and, frankly,
5 this was leading to my third point, which is, if there
6 is absolutely no way that -- if there's no indicia that
7 you're actually trying to influence the outcome, and it
8 really is just a meeting, yes. But that reflects the
9 fact that these broad and vague statutes are not
10 comprehensive codes of ethical conduct. There are lots
11 of other statutes that would prohibit precisely what you
12 are suggesting, Justice O'Connor, and you don't have to
13 interpret --

14 JUSTICE GINSBURG: That hasn't happened in
15 quite some time.

16 (Laughter.)

17 MR. FRANCISCO: Justice Ginsburg. I am
18 very, very, very sorry.

19 (Laughter.)

20 MR. FRANCISCO: Justice Ginsburg, my
21 apologies.

22 There are lots of other statutes that would
23 prohibit that precise conduct, and you don't need to
24 take statutes like the Hobbs Act and honest-services
25 statute.

1 JUSTICE KAGAN: Well, what would --
2 Mr. Francisco, just take Mr. Dreeben's own example,
3 which is the example of somebody -- he's running a
4 business, and he's taking \$5,000 at a pop every time he
5 arranges a meeting with the criminal division for
6 somebody.

7 MR. FRANCISCO: Sure. There is a statute
8 that prohibits supplementing your public salary with
9 private money. So if you're essentially taking outside
10 money for the performance of your official duties,
11 that's illegal. That was discussed in the Sun-Diamond
12 case.

13 There is another statute that -- that
14 prohibits you from doing any -- taking anything from
15 anybody whose interests could be substantially affected
16 by the performance or nonperformance of your duties. So
17 that's another one. It would prohibit -- that would
18 prohibit it.

19 There is another provision of this bribery
20 statute that prohibits you from taking any action, not
21 just "official action" but any action in violation of
22 your official duties. So I think that might --

23 JUSTICE SOTOMAYOR: Why aren't they any less
24 vague?

25 MR. FRANCISCO: Excuse me?

1 JUSTICE SOTOMAYOR: Why aren't they any less
2 vague? And what you're saying is that holding a
3 meeting, taking a phone call, having a party is not
4 illegal, that that is something that you're entitled to
5 do. So why would all those statutes be any less --

6 MR. FRANCISCO: They may well be in certain
7 circumstances, but I think that the ones that are simply
8 saying -- for example, the civil service statutes that
9 simply say, you can't take anything from anybody who is
10 a covered person. That's not vague. It just says that
11 you can't take anything from anybody who is in your job.

12 Most Federal government officials are very
13 familiar with that. That's why you really just don't
14 take gifts from anyone. The problem here is that we had
15 a State regime that was much less stringent than the
16 Federal regime, and the government wanted to use the
17 open-ended Hobbs Act and honest-services statute to fill
18 that gap in what they perceived is the State law.

19 I would respectfully submit that that is an
20 inappropriate use of Federal power.

21 Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Dreeben, could I invite you to return to
24 the lectern? Our records reflect that this was your
25 one-hundredth oral argument before the Court. You are

1 the second person to reach that rare milestone this
2 century.

3 I distinctly recall your first argument in
4 January of 1989. Throughout your career, you have
5 consistently advocated positions on behalf of the
6 United States in an exemplary manner.

7 On behalf of the Court, I extend to you our
8 appreciation for the many years of advocacy and
9 dedicated service during your tenure in the Solicitor
10 General's Office and as an officer of this Court.

11 We look forward to hearing from you many
12 more times. Thank you.

13 The case is submitted.

14 MR. DREEBEN: Thank you.

15 (Whereupon, at 11:04 a.m., the case in the
16 above-entitled matter was submitted.)

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